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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79143408
Applicant	Sociedade Dos Vinhos Borges, S.A
Applied for Mark	FITA AZUL
Correspondence Address	JAMES L BIKOFF SMITH GAMBRELL & RUSSELL LLP 1055 THOMAS JEFFERSON ST NW SUITE 400 WASHINGTON, DC 20007 UNITED STATES jbikoff@sgrlaw.com, dklinksieck@sgrlaw.com, wdcdocting@sgrlaw.com, dcdocketing@sgrlaw.com
Submission	Applicants Request for Remand and Amendment
Attachments	FITA AZUL - Request to Suspend Appeal and Remand.pdf(395228 bytes) FITA AZUL - Coexistence Agreement between Vinhos Borges and Blue Ribbon IP.pdf(207746 bytes)
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Signature	/ Holly B. Lance /
Date	03/23/2016

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of

Sociedade dos Vinhos Borges, S.A.

Serial No. 79/143,408

Filed: January 29, 2014

Mark: FITA AZUL

Attorney Docket: 400021-9231

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

REQUEST TO SUSPEND APPEAL AND REMAND APPLICATION

Pursuant to TBMP § 1207.02 and 37 C.F.R. § 2.142(d), Applicant respectfully requests that the appeal for U.S. Ser. No. 79/143,408 for FITA AZUL (“Applicant’s Mark”) be suspended and the application remanded to the Examining Attorney based on new evidence in the form of a Trademark Consent and Co-Existence Agreement.

I. Background

The Examining Attorney refused registration of Applicant’s Mark based on a likelihood of confusion with a prior-registered registration for BLUE RIBBON SAKE, U.S. Reg. 3,528,568 (the “Cited Mark”). Applicant filed an *ex parte* appeal with the Trademark Trial and Appeal Board (“Board”) on November 10, 2015. At the time the appeal was filed, Applicant was negotiating with the owner of the Cited Mark, Blue Ribbon IP, LLC (“Blue Ribbon”), regarding the terms of a coexistence agreement. Applicant filed and received two extensions of its appeal

brief deadline in order to continue negotiations. The parties have now fully executed a Consent and Co-Existence Agreement, a copy of which is attached.

II. A Consent Agreement Constitutes Good Cause Pursuant to TBMP § 1207.02

If an applicant wishes to introduce additional evidence after an appeal has been filed, the applicant may file a written request with the Board to suspend the appeal and remand the application for further examination. TBMP § 1207.02. The request must be filed prior to the Board's rendering of a final decision on the appeal, and include a showing of good cause therefore. *Id.* The TBMP expressly recognizes that a consent agreement is a circumstance that constitutes good cause. *Id.* (“[B]ecause a consent agreement offered in response to a refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), is inherently difficult and time-consuming to obtain, and may be highly persuasive of registrability, the Board will grant a request to suspend and remand for consideration of a consent agreement if the request, accompanied by the consent agreement, is filed at any time prior to the rendering of the Board's final decision on the appeal.”). As this appeal is in a very early stage and a decision has not been issued, the appeal should be suspended and the application returned to the Examining Attorney for consideration of the Consent and Co-Existence Agreement.

III. The Consent and Co-Existence Agreement Should be Recognized and the Refusal Withdrawn

Consent agreements are highly persuasive of registrability. TMEP §1207.01(d)(viii) provides that an Examining Attorney should give “great weight” to a consent agreement and should not “substitute its judgment concerning likelihood of confusion for the judgment of the real parties in interest.” Where the parties most familiar with the marketplace and most concerned about avoiding confusion have entered into an agreement designed to avoid confusion, the Examining Attorney should not substitute his or her assumption that confusion is

likely because a “mere *assumption* that confusion is likely will rarely prevail against uncontroverted evidence from those on the firing line that it is not.” *See In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 568 (C.C.P.A. 1973) (emphasis in original). Indeed, “there can be no better assurance of the absence of any likelihood of confusion, mistake or deception than the parties’ promises to avoid any activity which might lead to such likelihood.” *Id.* at 568-569 (citing *In re Beatrice Foods, Co.*, 166 U.S.P.Q. 431, 437 (C.C.P.A. 1970)).

Paragraph 2 of the attached Consent and Co-Existence Agreement states: “The Parties Agree that there is no likelihood of confusion between Blue Ribbon IP’s use of its BLUE RIBBON SAKE mark for Blue Ribbon IP’s Goods and Vinhos Borges’ use of its FITA AZUAL mark for Vinhos Borges’ Goods provided the terms of this Agreement are followed.”

Applicant and Blue Ribbon are the parties who are most familiar with the marketplace for their respective goods and most interested in avoiding consumer confusion. Applicant and Blue Ribbon have determined that their marks can coexist in the marketplace without confusion in view of the overall differences between the parties’ marks, goods of interest, and their use of the marks. This determination, coupled with the parties’ express commitment to cooperate to remedy purchaser confusion in the unlikely event that any should arise (Paragraph 9), dictates that the Examining Attorney withdraw the Section 2(d) refusal.

In circumstances similar to those present here, the United States Court of Appeals for the Federal Circuit expressly recognized that it is improper for the Office to substitute its judgment for that of the trademark owners. In *Bongrain Int’l (Am.) Corp. v. Delice de France Inc.*, 1 U.S.P.Q.2d 1775 (Fed. Cir. 1987), the Federal Circuit stated:

We have often said, in trademark cases involving agreements reflecting parties’ views on the likelihood of confusion in the marketplace, that they are in a much better position to know the real life situation than bureaucrats or judges and therefore such agreements may, depending on the circumstances, carry great

weight, as was held in *DuPont* ... It is possible to preserve the registrations, as the parties originally agreed to do, by accepting their reasonable appraisal of marketplace conditions, and agreeing with them that confusion does not and is not likely to exist. Section 2(d) should be construed *in pari materia* with the rest of the Act and the historical policies known to underlie it.

Id. at 1778-1779.

The *Bongrain* rationale clearly applies to the present facts. The parties have carefully assessed the conditions in the marketplace and have determined that the coexistence of their respective marks is unlikely to confuse purchasers. Accordingly, the Examining Attorney should accept the parties' determination that confusion is not likely to exist.

IV. Conclusion

In view of the new evidence offered by Applicant, namely, a fully-executed Consent and Co-Existence Agreement, Applicant respectfully requests that the appeal for Applicant's Mark be suspended and the application returned to the Examining Attorney for further examination. Based on the importance of consent agreements in determining that no likelihood of confusion exists, Applicant further requests that the refusal to register Applicant's Mark based on Trademark Act § 2(d) be withdrawn and the application passed to publication.

CONSENT AND CO-EXISTENCE AGREEMENT

This Consent and Co-existence Agreement (“Agreement”) is entered into, effective as of March 7, 2016 (the “Effective Date”), by and between Blue Ribbon IP, LLC, a New York limited liability company having an address at 166 Mercer Street, Suite 6C, New York, New York 10012, USA (“Blue Ribbon IP”), on the one hand, and Sociedade dos Vinhos Borges, S.A., a corporation of Portugal having an address at Rua Infante D Henrique, N° 421, P-4435-286 Rio Tinto, Portugal (“Vinhos Borges”), on the other hand (collectively “the Parties”).

WHEREAS, Blue Ribbon IP is the owner of U.S. Trademark Registration No. 3,528,568 – BLUE RIBBON SAKE, for “alcoholic beverages, namely, sake” in International Class 33; and

WHEREAS, Vinhos Borges is the owner of U.S. Trademark Application Serial No. 79/143,408 and International Registration No. 1194085, both for the mark FITA AZUL (Portuguese for “blue ribbon” and/or “blue band”), for “alcoholic beverages, excluding beers” in International Class 33; and

WHEREAS, Blue Ribbon IP (including its predecessor-in-interest, Broco LLC) has been using, in U.S. commerce since April 1, 2008, its BLUE RIBBON SAKE mark on its goods, namely, sake (“Blue Ribbon IP’s Goods”); and

WHEREAS, Vinhos Borges has been using, in Europe since 1934 and in U.S. commerce since 1971, its FITA AZUL mark on its goods, namely, wines excluding rice wines (“Vinhos Borges’ Goods”); and

WHEREAS, Blue Ribbon IP’s BLUE RIBBON SAKE mark and Vinhos Borges’ FITA AZUL mark are visually and phonetically dissimilar and have distinct commercial impressions; and

WHEREAS, the BLUE RIBBON SAKE and FITA AZUL marks are used on significantly different goods; and

WHEREAS, the Parties have agreed and desire to assist one another in protecting their rights to use and register their respective marks and to avoid any disputes and litigation regarding the marks; and

WHEREAS, the Parties are unaware of any instance of actual confusion which has occurred on the basis of contemporaneous use of their respective marks for their respective goods; and

WHEREAS, the Parties thus believe there is no likelihood of confusion between their respective uses of their marks pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, for good and reasonable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The recitals above are incorporated by reference into this Agreement.
2. The Parties agree that there is no likelihood of confusion between Blue Ribbon IP’s use of its BLUE RIBBON SAKE mark for Blue Ribbon IP’s Goods and Vinhos Borges’ use of its

FITA AZUL mark for Vinhos Borges' Goods provided the terms of this Agreement are followed.

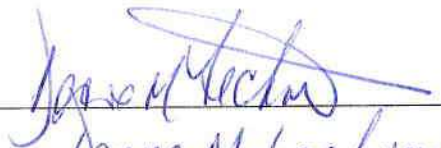
3. Vinhos Borges agrees not to use or promote its FITA AZUL mark on or in connection with Blue Ribbon IP's Goods, and agrees not to use or promote its FITA AZUL mark or a mark likely to be confused with BLUE RIBBON, *e.g.*, CORDON AZUL, in connection with restaurant, bar, hotel or nightclub services.
4. Vinhos Borges agrees that it will not object to the use and/or registration of the mark CORDON AZUL in connection with restaurant services or liquor by Blue Ribbon IP or its affiliates. Vinhos Borges will execute any documents (*e.g.* coexistence and consent agreements) necessary to assist Blue Ribbon IP in registering such marks.
5. Vinhos Borges additionally covenants not to use any mark likely to be confused with Blue Ribbon IP's marks attached to this Agreement as Appendix A, provided they are properly maintained and in use by Blue Ribbon IP.
6. Blue Ribbon IP agrees not to use or promote its BLUE RIBBON SAKE mark on or in connection with Vinhos Borges' Goods.
7. Vinhos Borges consents to the use and continued registration of the BLUE RIBBON SAKE mark by Blue Ribbon IP for Blue Ribbon IP's Goods, and agrees not to seek cancellation of such registration or to take any other action to limit such use and registration by Blue Ribbon IP, or to assist others in so doing. Vinhos Borges will neither seek to oppose nor seek to cancel any future application for registration or subsequent registration by Blue Ribbon IP of the BLUE RIBBON SAKE mark for Blue Ribbon IP's Goods.
8. Blue Ribbon IP consents to the use and registration of the FITA AZUL mark by Vinhos Borges for Vinhos Borges' Goods, and agrees not to oppose or seek cancellation of any resulting registration or to take any other action to limit such use and registration by Vinhos Borges, or to assist others in so doing. Blue Ribbon IP will not seek to oppose nor seek to cancel any future application for registration or subsequent registration by Vinhos Borges for the FITA AZUL mark for Vinhos Borges' Goods. In the event consent by Blue Ribbon IP is necessary or desirable for any of Vinhos Borges' applications for and/or renewal of its FITA AZUL mark, Blue Ribbon IP shall undertake to provide its consent in the form reasonably requested and prepared by Vinhos Borges, the reasonable cost of which will be borne by Vinhos Borges.
9. The Parties agree to cooperate and consult with one another, in good faith, should future conditions or developments suggest to either that there is a possibility that the Parties' respective uses of their marks might be likely to cause confusion, all with the view that no likelihood of confusion between the Parties' respective uses in commerce of their marks shall occur.

10. This Agreement and the provisions herein are effective as of the Effective Date and shall be binding upon, remain valid and inure to the benefit of the respective Parties' predecessors, heirs, successors, licensees and assigns.
11. Upon the full execution of this Agreement, Vinhos Borges will make a one-time payment of \$2,000 to Blue Ribbon IP to cover its attorneys' fees in connection with the drafting of and its compliance with this Agreement.
12. This Agreement contains the entire understanding between the Parties relating to this subject matter and may not be modified except by an instrument in writing signed by an officer or duly authorized representative of each of the Parties hereto.
13. The Parties acknowledge that they are entering into this Agreement freely and voluntarily, that they have consulted legal counsel in connection with this Agreement, that they have ascertained and weighed all the facts and circumstances likely to influence their judgment herein, that they have given due consideration to the provisions contained herein and that they thoroughly understand and consent to all provisions hereof.
14. The scope of this Agreement and the territory to be covered is worldwide.
15. If any provision or provisions of this Agreement are held to be invalid, illegal or unenforceable, in whole or in part, under any law or regulation, by a court of competent jurisdiction, then such provision or portion of such provision, as appropriate, shall remain in effect only to the extent that it is valid and the validity, legality and enforceability of the remaining provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.
16. This Agreement may be executed in counterparts, each of which shall be considered one and the same Agreement, each of which shall be deemed an original.

IN WITNESS WHEREOF, each of the Parties has executed and delivered this Agreement.




BLUE RIBBON IP, LLC




SOCIEDADE DOS VINHOS BORGES, S.A.

By: 
Name: Donna M. Lachman, CPA
Title: CFO
Date: 3/9/16

By: _____
Name: _____
Title: _____
Date: _____

Appendix A: Blue Ribbon IP Marks

Mark	App. No.	Reg. No.	Goods/Services
BROMBERG BROS. BLUE RIBBON RESTAURANTS	78292213	3101527	Dips; anchovy paste; fennel slaw; smoked fish and shellfish; soups; pate; potato-based snack foods; onion rings; frozen entrees consisting primarily of meat, fish, poultry or vegetables; escargot; butter; pickled vegetables; cheese fondue, in Class 29
	78292231	3319392	Chili sauce; hot sauce; salad dressings; mayonnaise; horseradish; tartar sauce; egg rolls; seasonings; processed herbs, namely, herb mixes for flavoring food; spices; frozen entrees consisting primarily of pasta or rice; bakery goods; sauces for topping desserts; bread; rolls; dumplings; rice; sushi, in Class 30
	78292234	3349257	Dips; anchovy paste; fennel slaw; smoked fish and shellfish; soups; pate; potato-based snack foods; onion rings; frozen entrees consisting primarily of meat, fish, poultry or vegetables; escargot; butter; pickled vegetables; cheese fondue, in Class 29
NAKED NUGGETS	78890307	3363674	Frozen chicken entrees, in Class 29
SHED THE BREAD	77272846	3558516	Frozen chicken entrees, in Class 29
BLUE RIBBON	77316337	3633719	Retail store services featuring food, groceries, candy, baked goods, canned goods, frozen goods, meat, poultry, fish, vegetables, in Class 35
SIMPLE SLIDERS	77922596	4016561	Frozen chicken entrees; frozen chicken burgers, in Class 29
	85086885	4029756	Bar and restaurant services, in Class 43
BROMBERG BROS. BLUE RIBBON RESTAURANTS	85102236	4032604	Bar and restaurant services, in Class 43
THE PLANET'S FIRST GRILLED CHICKEN NUGGET CHEFS TO THE CHEFS	77760198	4106944	Frozen chicken entrees, in Class 29
	85103428	4119223	Consultancy services in the field of menu planning for others; consultation services in the field of restaurant menu development; consulting services in the field of culinary arts; consulting services in the field of hospitality, in Class 43
TOUR DE FOOD	77604958	4198777	Entertainment services, namely, an on-going audio-visual program distributed over television and audio and visual media in the fields of food, cooking and travel, in Class 41
BROMBERG BROS. BLUE RIBBON FRIED CHICKEN	85424029	4471308	Bar and restaurant services, in Class 43
STANWICH	86078870	4501866	Sandwiches, in Class 30
BROMBERG BROS. BLUE RIBBON	77894814	4505552	Cookbooks, in Class 16
BOURBON ST.	86078895	4623580	Milkshakes, in Class 29

Mark	App. No.	Reg. No.	Goods/Services
	85825799	4692885	Bar and restaurant services, in Class 43
EGG SHOOTERS	86078884	4745993	Prepared food dishes, namely, prepared entrees consisting primarily of eggs, in Class 29
THE RIBBON	86066232	4837296	Bar and restaurant services, in Class 43
	86040655		Bar and restaurant services, in Class 43
#CLUCKYEAH	86887299	N/A	Bar and restaurant services, in Class 43
CLUCK YEAH	86887308	N/A	Bar and restaurant services, in Class 43
SMORGASBIRD	86889980	N/A	Sandwiches, in Class 30
BLUE RIBBON	N/A (common law)	N/A	Restaurant services
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14. The scope of this Agreement and the territory to be covered is worldwide.
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BLUE RIBBON IP, LLC

By: [Signature]
Name: Diana M. Lachina, CPA
Title: CFO
Date: 3/9/16




SOCIEDADE DOS VINHOS BORGES, S.A.

**SOCIEDADE DOS VINHOS BORGES, S.A.
ADMINISTRAÇÃO**
By: [Signature]
Name: FERNANDA VIEIRA
Title: PRESIDENT
Date: 03/14/2016

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#CLUCKYEAH	86887299	N/A	Bar and restaurant services, in Class 43
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